IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.99 OF 1989

Shri Baburao Balappa Chikhali ..Appellant

Versus

Shri Mahadeo Balappa Chikhali & Ors. ..Respondents

Mr.M.R.Suryawanshi for appellant

Mr.M.R.Katikar for respondents.

CORAM : P.V.KAKADE, J.

DATE : 6TH OCTOBER, 2004

P.C.:

1. This is an appeal filed against the judgment and order passed by Addl. District Judge,Kolhapur dismissing the appeal of the appellant-plaintiff and confirming the order passed by Civil Judge, Junior Division, Gadhinglas dismissing the plaintiff’s suit.

2. Heard the learned counsel for both the parties. Perused the record as well as judgment of both the Courts below.

3. The field being Gat No.221 admeasuring 4 H. 38 R of village Basarge Khurd was belong to Government and was purchased by the plaintiff for Rs.400/= by virtue of an order of the Sub-Divisional Officer, Kolhapur, dated 10th December, 1956. As per the order of the S.D.O. the plaintiff accepted the terms and conditions laid down in the order and accordingly executed as Kabulayat in favour of the Government. The suit land is non-alienable land. It was submitted by the plaintiff that since the date of the purchase, the land is in his possession.

. He however, submitted that the defendants are his brothers and by virtue of their relations, he permitted them to cultivate the suit land along with him. The plaintiff alleged that though he alone was owner of the suit land, the defendants got their names incorporated in the record of the suit land in the absence of the plaintiff, from the Talathi in the year

1966-67. He further alleged that on the strength of the said entry, now, the defendants are claiming right in the suit land and are obstructing the plaintiff and hence the suit came to be filed for declaration and for consequential relief of possession.

. Both the defendants have filed their written statement, inter alia, denying the allegations and the claim of the plaintiff. The defendants have submitted that the plaintiff had filed R.C.S. No.90 of 1963 in the lower court against the present defendants for injunction and the same was dismissed and the appeal against the same was also dismissed and hence the suit is barred by virtue of principle of res-judicata. They have further contended that the suit is not within limitation. They have further contended that the suit land was purchased by the plaintiff as a manager of the joint family, and thus, it is the joint family property of the plaintiff and the defendants. Hence they submitted that the suit is not tenable. In the alternative, they have submitted that in case the court comes to the conclusion otherwise, then the defendants may be declared owner of the land which is in their possession by virtue of adverse possession since 1960.

The defendants have further submitted that the plaintiff has filed this false suit after several litigations regarding the suit land were decided against him. Therefore, they have prayed to dismiss the suit of the plaintiff and to award compensatory costs of Rs.300/= from the plaintiff.

4. The learned Trial Judge adjudicated the dispute on merits and came to the conclusion that plaintiff held to be proved that suit property was to be granted to him alone and he is the sole owner thereof and as such the suit came to be dismissed with costs.

5. An appeal preferred against the said judgment and order also came to be dismissed by the ld. Addl. District Judge upholding the findings recorded by the Learned Trial Judge and dismissing the suit and appeal. Hence the present appeal.

6. At the outset, it may be noted that the learned counsel for the appellant sought to raise so called substantial questions of law in respect of that defendants that Karta of joint family is restrained from acquiring a property as his self acquired property

without using joint family nucleus. In my considered view, the sole substantial question of law sought to be raised in this appeal is almost relevant for the purpose of our adjudication. The question of nucleus of presumption thereunder would not come into picture and is not required to be considered, in view of the fact that the plaintiff and the defendants are admittedly real brothers and defendants are in joint cultivation of the land since prior to 1963 when first suit was filed by the plaintiff for injunction simplicitor against them which came to be dismissed, holding that the defendants were in joint possession of the property.

. The facts are not in dispute that the suit property was belonging to Government and it was granted to the plaintiff in the year 1960 and the plaintiff had deposited Rs.400/= towards the occupancy price and a Kabulayat regarding the suit property was executed in favour of the plaintiff alone. The said Kabulayat is at Exh.53. It is the case of the plaintiff that since 1960 he alone is in possession of the suit property and the defendants have no right, interest and title in the suit property. He alleged that the Defendants fraudulently got entered their names in 7 x 12 extract of the suit

property in the year 1966-67. He further contended that even if, the names of the defendants are mutated in the record of the suit property, they cannot claim to be the owner of the suit property. Finally, the plaintiff submitted that he alone is the owner of the suit property and hence he filed this suit for declaration and possession of the suit property. the plaintiff has also pleaded that the defendants are his real brothers and they were cultivating the suit land along with the plaintiff. In this connection, it was argued that though the defendants were cultivating the suit land, they had no right. According to the defendants, though the suit land was granted in the name of the plaintiff, alone, it was granted in the name of the plaintiff for the joint family and at the relevant time the plaintiff was manager of their family. It is admitted that in the year 1963 the plaintiff had filed the suit for permanent injunction against the defendants in the court of Civil Judge, junior Division, Gadhinglaj bearing R.C.S. No.90/63 regarding the suit property. Admittedly the said suit was dismissed. In that suit issue No.1 was as under :

1. Whether the plaintiff proves his exclusive

possession of the suit property at the date of the suit?

. From the record, it appears that the above suit was filed on 16th August 1963. In that suit, it was held that the plaintiff was not in possession of the suit property and hence, the suit for permanent injunction was dismissed. Thus, the fact remains that on 16th August, 1963, the plaintiff alone was not in possession of the whole suit property. Further, according to the plaintiff, he alone is the owner of the suit property because he alone had paid the price of the suit land and the suit property was transferred in his name only. From the record, it is clear that the plaintiff and the defendants are real brothers. In case of real brothers, there is a strong presumption of joint family unless the contrary is proved. There is no iota of evidence on record to show that the plaintiff and the defendants were ever separated from each other. Further, it was brought to the notice of the plaintiff that he had deposed in R.C.s.No.90/63 that at the time of purchase of suit property all of them were residing together. The said portion of the testimony is marked "A". The plaintiff however, denied the correctness of

the said portion of his testimony, vide Exh.56. The plaintiff however, could not assign any reason as to why his testimony was recorded so. Moreover, it was discussed and held in the judgment Exh.58, that the plaintiff alone was not the exclusive owner of the suit property. In the judgment, the then learned Civil Judge has made a reference to the so-called portion of the he is the sole owner of the suit property.

7. In view of this position reference must be made to the rulings of the Supreme Court in the case of **KONDIBA DAGADU KADAM VS. SAVITRIBAI SOPAN GUJAR & ORS. AIR 1999 (3) SUPREME COURT 2213** wherein it is stipulated that the conditions mentioned in the Section 100 must be strictly fulfilled before a second appeal can be maintained and no Court has the power to add to or enlarge those grounds. The second appeal cannot be decided on merely equitable grounds. The concurrent findings of facts howsoever erroneous cannot be disturbed by the High Court in exercise of the powers under this section. It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first appellate court. In a case where from a

given set of circumstances two inferences are possible, one drawn by the lower appellate Court is binding on the High Court in second appeal. Adopting any other approach is not permissible. Therefore, if we take into account this ratio and apply to the present case, there is no doubt whatsoever that both the courts have fully appreciated the evidence in proper manner. No doubt Kabulayat Exh.B on record was in the name of plaintiff alone, however, the fact remains that at the relevant time he was acting as a Karta of family and inspite of this position all the brothers were found to be in possession of the suit property and jointly cultivating the same. In view of this position there is no question of establishing ownership title by the plaintiff in this case. In the result the second appeal has no merits and deserves to be dismissed and stands dismissed with no order as to costs.

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